160 U.S. 103

RECORD, CASE No. 14,031.

160-103.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., ~~102~~ 21 5

THE WASHINGTON AND IDAHO RAILROAD COMPANY, APPELLANT,

vs.

S. V. WILLIAM OSBORN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED MAY 9, 1890.

RECORD, CASE No. 14,031.

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vs.

S. V. WILLIAM OSBORN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 26, 1893.

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1 THE UNITED STATES OF AMERICA:

To S. V. William Osborn, respondent:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed by the supreme court of the Territory of Idaho, in open court, on the — day of March, 1889, and duly entered on the records of said court, wherein The Washington and Idaho Railroad Company is appellant and you, the said S. V. William Osborn, is appellee, to show cause, if any there be, why the judgment entered and rendered in this case by the supreme court of the Territory of Idaho on the — day of March, 1889, against the appellant should not be reversed and the errors therein corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Henry W. Weir, chief justice of the supreme court of the Territory of Idaho, this 24th day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

H. W. WEIR,
Chief Justice of the Supreme Court of Idaho Territory.

Attest:

[Seal Supreme Court, Idaho Territory.]

S. H. HAYS,
Clerk Supreme Court, Idaho Territory.

We do hereby acknowledge due service of the foregoing citation this August 30th, 1889; also the bond on appeal, copies of all of which are herewith served and accepted.

WM. H. CLAGETT AND
ALBERT ALLEN,
Counsel for the Def't and Appellee in this Cause in the Supreme Court.

2 [Endorsed:] Washington & Idaho R. R. Co. *vs.* S. V. Wm. Osborne. Citation. Sept. 2d, 1889.

3 (No. 19. 1st Dist.)

Supreme Court, Idaho Territory, January Term, 1889.

WASHINGTON AND IDAHO RAILROAD CO., Appellants,
vs.
S. V. WILLIAM OSBORNE, Respondent.

Appeal from 1st dist., Shoshone Co.

Woods and Heyburn, att'ys for appellant.
Wm. H. Clagett and Albert Allen, att'ys for respondents.
Filed January 10th, 1889.

A. L. RICHARDSON, *Clerk*,
By B. S. PRICKETT, *Deputy*.

1 102

4 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.

Pleas begun, continued, and held in the district court of the first judicial district of the Territory of Idaho in and for Shoshone county, before the Hon. John L. Logan, district judge, on the 18th day of September, A. D. 1888, and judgment rendered in open court by the before said judge of said court on the 5th day of October, A. D. 1888.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.

5 Be it remembered that on the 18th day of September, A. D. 1888, the plaintiff filed its complaint in said action; which said complaint is in words and figures as follows, to wit:

Complaint.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.

The said plaintiff, The Washington and Idaho Railroad Company, complains against the said defendant and alleges:

1st. That said plaintiff, The Washington and Idaho Railroad Company, now is and ever since the 5th day of July, A. D. 1886, has been a corporation duly organized and existing under the laws of the Territory of Washington for the purpose, among other-, of constructing, equipping, operating, and maintaining a railroad and telegraph line from the town of Farmington, in Washington Territory, by the most practical route in a generally northern direction to a point at or near the town of Spokane Falls, in said Washington Territory, and by a junction with said line near the forks of Hangman creek, in said Washington Territory, in a generally
6 northeastern direction across the Cœur d'Alene Indian reservation to a point near the mouth of the St. Joseph river, on Cœur d'Alene lake; thence in a northerly direction along the east side of the Cœur d'Alene lake to the Cœur d'Alene river; thence in a generally easterly direction to the Cœur d'Alene mission; thence in a southeasterly direction to the valley of the south

fork of the Cœur d'Alene river, via the town of Milo, to Wardner, in Idaho Territory, and continueing from said town of Milo, in Shoshone county, in Idaho Territory, following the south fork of the Cœur d'Alene river about twenty miles to the town of Mullen, in said Territory, and also a like railroad and telegraph line from said Mullen, in Idaho Territory, in an easterly direction by the most practical route across the Bitter Route mountains to Missoula, in the Territory of Montana, a distance of about one hundred miles.

2nd. That said plaintiff has heretofore, in compliance with the laws of Idaho Territory, caused to be filed and recorded in the office of secretary of said Territory a duly certified and authenticated copy of its articles and supplemental articles of incorporation, and has heretofore in writing duly designated and appointed a person residing in Nez Perce county, in said Idaho Territory, it be-
7 ing the county in which the principal place of business of said corporation in said Idaho Territory is conducted, upon whom process issued by the author- of or under any law of said Idaho Territory may be served, and has duly caused said designation and appointment to be filed in the office of the secretary of said Idaho Territory and in the office of the clerk of said county of Nez Perce and has in all respects complied with the laws of said Idaho Territory respecting foreign corporations transacting business therein.

3rd. That in pursuance of the said objects of its incorporation, for the purpose of obtaining a right of way over the public domain of the United States wherever its said railroad should traverse the same, the plaintiff, The Washington and Idaho Railroad Company, on the 23rd day of December, 1886, duly filed with the honorable Secretary of the Interior, at Washington, in the District of Columbia, a copy of its articles of incorporation and due proofs of its organization under the same, together with a duly certified copy of the laws of Washington Territory under which said corporation was organized, and in all respects duly complied with the requirements of the act of Congress approved March 3rd, 1875, enti-
8 tled "An act granting to railroads the right of way through the public lands of the United States" and the rules and regulations of the Hon. Secretary of the Interior, by reason whereof this plaintiff, The Washington and Idaho Railroad Company, on the 23rd day of December, A. D. 1886, became entitled to survey, locate, construct, operate, and maintain said railroad through and across the public lands of the United States along its said route of railroad and to acquire a right of way for such railroad of a strip of land to the extent of one hundred feet in width on each side of the central line of its said railroad through all public land along said route as granted by said act of Congress.

4th. That for the purpose of obtaining such right of way granted as aforesaid the plaintiff caused the central line of its said railroad to be surveyed from Farmington aforesaid to said point near the said forks of Hangman creek and thence along the course heretofore described to said town of Mullen; that said central line of route of said railroad as so surveyed was at the time of making such survey

marked upon the ground by setting stakes such as are usually employed by surveyors of railroad lines, driven in the ground
9 at the end of each one hundred feet of said line, commencing at said Farmington and extending thence along said surveyed route to said forks of said Hangman creek and thence along said surveyed route to said town of Mullen. Each of the said stakes denoted a station of one hundred feet, and each of said stakes was numbered and marked in the manner usual with surveyors of railroad lines, and the said central line of route of said railroad as so surveyed and marked upon the ground was surveyed and marked upon the ground in the usual and customary way of surveyors surveying and locating the line of route of railroads, and the same at all times had been and is readily to be observed and traced upon the ground; that said surveyed route was duly adopted by this plaintiff as and for its definite survey and location of its said line of route of its said railroad.

5th. That the work of so surveying the first section of said survey, beginning at said Farmington and extending to said forks of Hangman creek, a distance of eleven and $\frac{5}{10}$ miles, was begun August 30th, 1886, and completed September 11th, 1886; that the survey of the second section of said route of survey from said forks of Hangman creek to the western boundary line of the Cœur
10 d'Alene Indian reservation, a distance of two and $\frac{1}{10}$ miles, was begun September 13th, 1886, and completed September 16th, 1886; that the said survey of that said section or portion of said surveyed line beginning near the Old Mission and extending along said Cœur d'Alene river and the south fork thereof to a point at or near Osborne, a distance of twenty miles, was begun September 25th, 1886, and completed October 22nd, 1886; that the survey of that section of said surveyed lands beginning at a point at or near said Osborne and extending thence to said Mullen, a distance of twelve and $\frac{8}{10}$ miles, was begun October 22nd, 1886, and completed November 3rd, 1886.

6th. That immediately after each of said sections of said survey was made the plaintiff caused correct maps or profiles thereof respectively to be made, which were respectively duly verified by the affidavits of P. Zahner, at that time chief engineer of this plaintiffs, written on each of said maps and signed by him officially agreeably to the rules and regulations of the Hon. Secretary of the Interior in the premises, and in each of which affidavits it was set forth that such survey was made by said affiant as the chief engineer of said plaintiff under the authority of this plaintiff and giving the termini and distance of each of said sections respectively, and also
11 the respective dates between which each of said surveys was made, and also stating that each of said surveys was accurately represented on said maps respectively. Each of said maps also had bearing thereon the official certificate of the president of this plaintiff, attested by its secretary, under its corporate seal, regarding the said P. Zahner, the persons signing the said affidavits, that he was at all such times the chief engineer of this plaintiff, and that the said surveys respectively were made under the author-

ity of this plaintiff, and also that the line of route so surveyed and so represented by said maps respectively was adopted by this plaintiff by resolution of its board of directors of dates respectively December 2nd, A. D. 1886, and December 24th, A. D. 1886, as the definite location of the line of route of this plaintiff's said railroad, said certificate on said map of said first section starting from said Farmington to a point near said forks of Hangman creek, a distance of eleven and $\frac{5}{10}$ miles; said certificate on said map of said second section starting near said forks of Hangman creek to the Washington and Idaho boundary line, a distance of two and $\frac{1}{10}$ miles; said certificate on said map of said third section starting from the
12 eastern boundary line of the Cœur d'Alene Indian reservation, near the Old Mission, to a point near Osborne, on the south fork of the Cœur d'Alene river, a distance of twenty miles, and said certificate on said map of said fourth section starting from said point near said Osborne to said Mullen, a distance of twelve and $\frac{8}{10}$ miles, and each of said certificates further setting forth that the said map to which it related had been prepared to be filed for the approval of the Secretary of the Interior, in order that this plaintiff, The Washington and Idaho Railroad Company, might obtain the benefits of said act of Congress approved March 3rd, 1875, and that thereafter said maps or profiles respectively were duly transmitted to the Hon. Secretary of the Interior and were duly and unconditionally approved by said Secretary, and such approval was endorsed thereon respectively as follows: that of said section $11\frac{5}{10}$ miles January 12th, A. D. 1887; that of $2\frac{1}{10}$ miles January 12th, 1887; that of said section of 20 miles March 5th, 1887, and that of said section of $12\frac{8}{10}$ miles February 7th, 1887.

7th. That by reason of the premises this plaintiff on November 3rd, 1886, became and ever since has been and now is the owner of a right of way through all public lands to the extent of one hundred feet on each side of the center line of its said railroad as the same was so surveyed from said point near said Old Mission to
13 said Mullen, and that all lands through which the said line of road is so surveyed and located between said points are now and at all times prior hereto have been unsurveyed public lands of the United States, except that portion of said land lying within township 49 north, range 1 east, of the Boisé meridian, which is still Government land, belonging to the United States, subject to the grant to plaintiff.

8th. That said plaintiff had made arrangements and entered into contracts for the immediate construction of its said railroad over and along its route from said town of Farmington to said town of Mullen, and that the persons to whom the said contracts are let are fully ready with large forces of men and teams and all necessary preparations to enter immediately upon said route of the plaintiff and construct its said railroad thereon between the said town of Farmington and said town of Mullen and every part thereof; that the plaintiff is in all respects conforming to and intends to conform to the provisions of the said act of Congress approved March 3rd, 1875, and the rules and regulations of the said Secretary of the

Interior relative to such survey, location, and construction of its said railroad.

9th. Plaintiff further alleges that one S. V. William Osborne claims to be the owner of and entitled to the possession, as against the plaintiff, of a certain ranch claim situated on the line of plaintiff's railroad, so located as aforesaid, in the county of Shoshone, Territory of Idaho, between stations 3433.65 and 3464.70 on said line, and that on the 28th day of July, 1888, the plaintiff commenced proceedings in condemnation against said S. V. William Osborne and others to condemn the right of way for its railroad over and through said ranch so claimed by S. V. William Osborne as aforesaid, and, upon proceedings being duly had, the above-named court did, on the 13th day of August, 1888, appoint commissioners to appraise and assess the damages which the said Osborne would suffer by reason of the condemnation for plaintiff's right of way for its railroad over and through said ranch as aforesaid, and after due notice being given, and the parties, plaintiff and defendant, being present in person and by counsel, at a point within one mile of the ranch aforesaid, the said commissioners sat to hear testimony of the parties for the purpose of appraising and assessing the damages as aforesaid, and went upon and viewed said premises, and, upon said hearing before said commissioners, it appeared from the testimony offered on behalf of the said Osborne that his settlement was upon unsurveyed public land of the United States, and that his clain to said ranch was made because of such settlement and what was termed a "squatter's right." It further appeared from the testimony so offered that at the time of the survey and location of plaintiff's said railroad and the above-described right of way the land over and through which the same passes was not enclosed by the said Osborne, and the said Osborne has never made any entry or filing in any United States land office upon said land so claimed and has taken no steps to acquire any title to the same from the Government of the United States.

10th. Plaintiff further alleges that all the land included in said ranch is now unsurveyed land and a part of the public domain of the United States.

11th. That prior to the commencement of said proceedings for condemnation plaintiff did not know nor could it obtain sufficient information to advise it of the nature and character of the said S. V. William Osborne's claim to the said ranch.

12th. That the said commission, so appointed as aforesaid, after viewing the said premises and hearing said testimony, assessed the damages to the said ranch as follows: Twelve acres of land, at $133.00 per acre, $1,596.00; damages to land not sought to be condemned, $2,000.00; constructing water across track, $600.00; condemnation of ice-house, cellar, and hotel, $2,000.00, and 316 rods of fencing, $1.50 per rod, $474.00; making a total of $6,670.00.

13th. That from the testimony given on behalf of S. V. William Osborne, as aforesaid, the plaintiff is advised and believes that the

said Osborne has no title or right to the possession of the said premises and right of way sought to be condemned as against the plaintiff, and that in equity and good conscience it should not be compelled to pay the said Osborne any damage or compensation for said right of way over and across said ranch.

14th. Plaintiff further alleges that at the time of the filing and approval of its plats showing its right of way over the lands aforesaid by the Hon. Secretary of the Interior of the United States, as aforesaid, the said premises were a part of the public domain of the United States, and that the right of plaintiff to construct its railroad over the same, and to the exclusive use and occupancy thereof, is paramount to that of S. V. William Osborne or any other persons, except the Government of the United States.

15th. Plaintiff here offers to pay into court the sum of money so assessed as aforesaid as damages to defendant, there to abide the determination of the question as to the right of occupancy of the right of way in controversy herein.

16th. Plaintiff further alleges that there are no buildings
17 or structures upon the said right of way sought to be condemned in said action other than fences.

Wherefore plaintiff prays that it may be decreed to be the owner of and entitled to the possession of all that portion of the said ranch claimed by the defendant covered by the right of way of plaintiff so described and claimed as aforesaid as against the defendant and every other person, and that plaintiff be entitled to have the immediate possession of the said right of way and premises and be allowed to construct, complete, and operate its said railroad over and along the same, and that defendant and all persons claiming by, through, or under him or to act by his authority or for him be restrained and enjoined from interfering with or molesting the said plaintiff in such occupation, construction, and operation of its said railroad over and along said right of way and part thereof and for general relief.

WOODS AND HEYBURN,
Attorneys for Plaintiff.

18 TERRITORY OF IDAHO, } ss:
County of Shoshone, }

W. B. Heyburn, being duly sworn, on his oath says that he is the solicitor of the plaintiff herein, duly elected by its board of directors; that he has heard the foregoing complaint read and knows the contents thereof, and that the same is true of his own knowledge except as to those matters and things therein stated to be on information and belief, and as to those matters and things he believes them to be true; that he makes this affidavit on behalf of plaintiff, who is absent from this county, where its attorneys reside, and that the facts stated within the complaint are within the knowledge of the affiant.

W. B. HEYBURN.

Subscribed and sworn to before me this 18th day of September, 1888.

BARRY N. HILLARD,
Notary Public.

[SEAL.]

Indorsed: In the district court, 1st judicial district of Idaho in and for Shoshone county. The Washington and Idaho R. R. Co. *vs.* S. V. William Osborne. Complaint. Filed Sept. 18th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods & Heyburn, att'ys for pl't'ff.

And afterwards and on Sept. 20th, 1888, defendants filed their demurrer, which is in words and figures as follows, to wit:

19 *Demurrer.*

In District Court, First Judicial District, in and for Shoshone County, Idaho.

THE WASHINGTON & IDAHO R. R. Co., Pl't'ff,
vs.
S. V. WILLIAM OSBORNE, Defendant.
} Demurrer

Now comes above-named defendant and demurs to the complaint of pl't'ff herein on the grounds that said complaint does not state facts sufficient to constitute a cause of action.

WM. H. CLAGETT,
Att'y for Def't.

Endorsed: No. 438. W. & I. R. R. Co. *vs.* S. V. Wm. Osborne. Demurrer. Copy rec'd September 20th, 1888. Woods and Heyburn, for pl't'ff. Filed Sept. 20th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Wm. H. Clagett, att'y for def't.

20 And afterwards and on the 1st day of October, 1888, the demurrer to the complaint on file herein was by the court overruled; which said order is in words and figures as follows, to wit:

Order Overruling Demurrer.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County. Fifty-seventh Judic-al Day, Monday, October 1st, A. D. 1888.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.
} No. 438.

At this day the demurrer to the complaint herein, heretofore argued and submitted, was by the court overruled.

And afterwards and on October 1st, 1888, defendant filed his answer, which is in words and figures as follows, to wit:

21 *Answer.*

In District Court, 1st Judicial District, in and for Shoshone Co., Idaho.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, A Corporation, Pl't'ff, *vs.* S. V. WILLIAM OSBORNE, Def't. } Answer.

Now comes the defendant in the above-entitled action and for answer to the complaint of pl't'ff herein says:

That as to the allegations contained in the 1st, 2nd, 3rd, 4th, 5th, 6th, and 8th paragraphs of said complaint, this def't has no information or belief on the subject of any of said allegations to enable him to answer the same, and therefore denies each and all of said allegations.

Denies that on Nov. 3rd, 1886, or at any other time pl't'ff became or ever since said date has been or now or ever was the owner of a right of way one hundred feet (or any number of feet) in width on each side of the central line of its proposed railroad as the same was surveyed (or otherwise) from the Old Mission to the town of Mullen.

Admits that def't claims to be the owner of and entitled to the possession of, as against pl't'ff and all persons except the Gov. of the United States, *of* the land mentioned in said complaint, and avers that he is such owner.

Denies that the line of pl't'ff's proposed railroad, as described
22 in said complaint, viz., between stations 3433.65 and 3464.70, was ever surveyed by pl't'ff at the time mentioned in said complaint or at any time prior to the month of May, 1888, but, on the contrary, avers that the only line ever run by pl't'ff through the farm of def't prior to the month of May, 1888, was run to the south of the pretended line of railroad described in said complaint and about seven hundred feet distant therefrom.

Denies that it appeared from the testimony offered on behalf of def't (or otherwise) before the commissioners heretofore appointed by this hon. court that def't's claim was made only because of his settlement on said ranch, or that def't has only a squatter right thereto.

Denies that it appeared from said testimony or otherwise that at the date of pl't'ff's survey, as alleged in said complaint, the said farm of def't was not enclosed by def't, or that def't had never made any entry upon the same or had taken no steps to acquire the title of the Gov. thereto.

Denies that pl't'ff, prior to commencement of proceedings to condemn a right of way through the said farm of def't, did not know or could not obtain sufficient information to advise it of the nature or character of def't's claim to said ranch, but, on the contrary,

avers that pl't'ff at all times had full knowledge of the nature and character of said claim.

23 Denies on information and belief that pl't'ff is advised or believes that def't has no title or right to the possession of said farm or right of way sought to be condemned as against pl't'ff or that pl't'ff should not be compel-ed to pay def't any damage or compensation for said alleged right of way, but, on the contrary, avers on information and belief that pl't'ff well knows that def't has the right of possession to said land, and that this action is brought for the purpose of harassing this def't into some sort of settlement by which said land may be obtained by pl't'ff without paying an adequate compensation therefor.

Denies that at the alleged time of filing by pl't'ff of its alleged plats, showing its pretended right of way over the land of def't, with the Hon. Secretary of the Interior or at any other time the right of pl't'ff to construct its railroad over the same was or is paramount to the right of def't therein or that pl't'ff now has or has ever had the right to the exclusive or any use or occupancy thereof or any right whatever thereto or therein, and this def't, further answering, avers and charges the truth to be that he is a citizen of the United States, over 21 years of age (native-born), and that he has never had the benefit of the pre-emption or homestead laws of the United States, and is in all respects qualified in law to initiate pro-

24 ceedings to obtain title to one hundred and sixty acres of agricultural land belonging to the United States; that the farm of def't through which the pl't'ff seeks, by condemnation or otherwise, to obtain the entry and right of way specified in the complaint herein, was located and settled upon in the year 1885 by one Seth McFarren and one Samuel Norman, who in that year built a house and other buildings thereon, marked off the corners of the same, and partly fenced the same on its exterior boundary, as defined by their corner stakes; that said McFarren and Norman resided constantly upon said ranch, living in the dwelling-house aforesaid, and constantly engaged in enclosing and improving the same during the year 1885 and down to March 18th, 1886, at which lat-er date this def't duly purchased the same from them, paying therefor the sum of two thousand dollars; that on March 18th, 1886, after said purchase, this def't filed in the office of the county recorder of Shoshone Co., Idaho, his homestead declaration under the possessory land act of said Territory and took immediate and actual possession of the entire tract of land embraced within the limits of the same; that said ranch contains less than 160 acres of land; that def't purchased the possessory claim of said McFarren and Norman thereto and filed said homestead declaration for the purpose of making the same a permanent home and with the

25 intent in good faith to initiate and perfect a title thereto under the homestead or pre-emption laws of the United States; that ever since the said 18th day of March, 1886, def't has resided upon said ranch (known as and called the Buckhorn ranch) continuously, constantly improving the same, and that during the summer and early fall of the year 1886, and long before pl't'ff made any survey

through the same, he completed the enclosure thereof, and that altogether he has actually expended in improvements on the same the sum of eight thousand dollars, exclusive of the sum of two thousand dollars paid therefor as aforesaid.

Def't further says that the proposed right of way for pl't'ff's proposed railroad, described in said complaint, cuts through the center of def't's garden of five acres of land, which def't has thoroughly reduced to cultivation and set out in an orchard, and that back of and to the south of said garden an equally good right of way for the public use can be had by pl't'ff and avoid the destruction of the garden as aforesaid, out of which this def't yearly clears the sum of $1,500.00, and that def't nowhere on his said farm has any land which is anywhere near as good for gardening purposes; that it is unnecessary for pl't'ff to go through said garden or condemn any portion of the same for the purpose of pl't'ff's proposed railroad.

26 Def't further says that he is not the proprietor of 320 acres of land in any State or Territory, and that he has not quitted nor abandoned a residence on his own land to reside upon the public lands in this Territory, and that he owns no other land in this Territory (except some mining claims) and no land whatever in any other State or Territory other than the farm aforesaid; that the only reason why this def't has not long before this filed his homestead or pre-emption declaration on said land in the U. S. land office of the land district embracing the same is because said land has not yet been surveyed by the United States, and that it now is and at all times heretofore has been his intention to file upon the same as soon as the same shall be surveyed and open to such filing. Def't further says that he has not settled upon and improved the said farm to sell the same on speculation, but in good faith to appropriate the same to his own exclusive use, and that he has not, either directly or indirectly, made any agreement or contract in any way or manner with any person whatsoever by which the title which he may acquire from the Gov. of the United States shall inure, in whole or in part, to the benefit of any person except himself. Wherefore def't, having fully answered, prays to be hence dismissed with his costs of suit.

WM. H. CLAGETT AND
ALBERT ALLEN,
Att'ys for Def't.

27 TERRITORY OF IDAHO, }
County of Shoshone, } *ss:*

S. V. W. Osborne, being first duly sworn, says under oath that he is the def't in the within-entitled action; that he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge except as to the matters that are therein stated on information and belief, and that as to those matters he verily believes it to be true.

S. V. WM. OSBORNE.

Subscribed and sworn to before me this Oct. 1st, 1888.

BARRY N. HILLARD,
Notary Public.

[SEAL.]

Indorsed: No. 438. W. & Idaho — *vs.* S. V. Wm. Osborne. Answer. Filed Oct. 1st, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Wm. H. Clagett and Albert Allen, att'ys for def't.

And afterwards and on October 5th, A. D. 1888, findings of fact and conclusions of law were filed, which are in words and figures as follows, to wit:

28 *Finding- of Fact and Conclusions of Law.*

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County, June Term, A. D. 1888.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.

This cause having come on for trial at the above term of court, in its regular order upon the calendar, on the first day of October, 1888, Mess. Woods and Heyburn appearing as attorneys for plaintiff and W. H. Clagett and Albert Allen appearing as attorneys for defendant, and the court having heard and considered all the evidence adduced by the respective parties, and having read and considered the pleadings in the case, and having heard and considered the arguments of counsel for the respective parties and being fully advised in the premises, the court finds the following facts:

First.

That in the 5th day of July, 1886, the plaintiff became a duly organized corporation under the laws of Washington Territory for the purpose of constructing, equipping, operating, and maintaining a railroad from the town of Farmington, in Washington Territory, by the most practical route in a generally northern direction to a point at or near Spokane Falls, in said Territory, and by
29 junction with said line near the forks of Hangman creek, in said Territory, in a generally northeasterly direction across the Cœur d'Alene Indian reservation to a point near the mouth of the St. Joseph river, on Cœur d'Alene lake; thence in a northerly direction along the east side of the Cœur d'Alene lake to the Cœur d'Alene river; thence in a generally easterly direction to the Cœur d'Alene mission; thence in a southeasterly direction to the valley of the South fork of the Cœur d'Alene river, via the town of Milo, to Wardner, Idaho Territory; and that afterwards, to wit, on the 8th day of November, 1886, by amended articles of incorporation, the plaintiff became a corporation organized to construct a

like railroad from said town of Milo, following said South fork of the Cœur d'Alene river, to the town of Mullen, and that the premises in controversy herein are situated in the valley of the said South fork and between said towns of Milo and Mullen.

Second.

That each and all the allegations contained in the 2nd, 3rd, 4th, 5th, and 6th subdivision- of plaintiff's complaint are true.

Third.

That the defendant is a native-born citizen of the United States, over the age of twenty-one years, and has never had the benefit of the pre-emption or homestead laws of the United States, and
30 is in all respects qualified in law to initiate proceedings to obtain title to one hundred and sixty acres of the agricultural lands belonging to the United States, and that the lands and premises hereinafter described, and every part thereof, are a part of the unsurveyed public lands of the United States and agricultural in character, not reserved from sale, and subject to settlement under the laws of the United States.

Fourth.

That in the year 1885 one Seth McFarren and one Samuel Norman settled upon the premises hereinafter described, who in that year erected a house and other buildings thereon, marked off the corners of the same, and partly fenced the same on its exterior boundaries as defined by their corner stakes, and that said McFarren and Norman resided constantly upon said premises, living in the dwelling-house aforesaid, and constantly engaged in improving said premises, until the 18th day of March, 1886, at which date, by a deed of conveyance, in consideration of the sum of two thousand dollars, they conveyed the said premises and all the improvements thereon to the defendant, and that the defendant at the time of said purchase caused the said premises to be surveyed by a surveyor and erected new corner posts at each corner thereof, and caused such posts to be plainly marked so as to indicate the corners of
31 said premises and with the name of said Osborne as the claimant, and that after said purchase the defendant filed in the office of the county recorder of Shoshone county, Idaho, his declaration to hold said premises under the pre-emption law, under the possessory land act of said Territory, and that said premises contain less than one hundred and sixty acres, and are described as follows, to wit.

Fifth.

That during all the time since the 18th day of March, 1886, the defendant has resided upon said premises and still resides thereon, making the same his home, and has made improvements thereon to the value of eight thousand dollars, consisting of a hotel, barn,

stables, ice-house, cellar, fences, clearing and cultivating 60 acres of the land, etc., and that prior to the making of any survey for a railroad by plaintiff over the same in the year 1886 the defendant enclosed all of said premises by a substantial fence, excepting a portion of the line on the south side thereof where the base of the mountain and the fallen timber made a natural barrier sufficient to turn stock and with the exceptions of a few places on the north
line of said premises where the steep bank of the river formed
32 a natural barrier sufficient to turn stock, and that at the time
said defendant settled thereon he intended and ever since has intended and now intends to obtain title to said premises under the pre-emption laws of the United States as soon as the same shall be surveyed by the Government, and that the defendant is not the proprietor of 320 acres of land in any State or Territory and did not quit or abandon a residence on his own land to reside upon the public lands in this Territory, and that the defendant has not settled upon or improved the said premises to sell the same on speculation but in good faith to appropriate the same to his own exclusive use, and that he has not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever by which the title which he may receive from the Government shall inure in whole or in part to the benefit of any person except himself.

33 *Conclusions of Law.*

From the foregoing facts the court finds the following conclusions of law:

First.

That the defendant is now and at all times since the 18th day of March, 1886, has been the owner of, as against all persons except the United States, and in possession of the land and premises described in the answer as the Buckhorn ranch, and in all respects qualified and entitled to enter the same under the pre-emption laws of the United States.

Second.

That the title and right of possession of defendant in and to said premises is prior to and paramount to the right of way of the plaintiff over said p-emises, and that plaintiff has no estate or interest in or right of way over or across said premises or any part thereof as against defendant.

Third.

That defendant is entitled to a judgment and decree of this court; that this action be dismissed, and that defendant have judgment for his costs herein, and it is so ordered.

Oct. 4th, 1888.

By the court:

JOHN L. LOGAN, *Judge.*

34 Endorsed: No. 438. W. & I. R. R. Co. *vs.* S. V. William Osborne. Findings of fact and conclusions of law. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy clerk.

And afterwards and on October 5th, A. D. 1888, findings of fact submitted were filed, which *which* are in words and figures as follows, to wit:

Findings of Fact Submitted.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.

The above cause having come regu-arly on for trial before the court sitting without a jury, and the parties, plaintiff and defendant, having submitted their proofs in support of the allegations of their complaint and answer herein, the plaintiff asked the court to find the following facts:

1.

Was the plaintiff at the time alleged in the complaint, to wit, since the 5th day of July, 1886, a corporation duly organized
35 and existing under the laws of Washington Territory, for the purpose, among others, of constructing, equipping, operating, and maintaining a railroad and telegraph line, as in said complaint alleged?

Yes.

J. L. L.

2.

Had the plaintiff complied with the laws of Idaho Territory with reference to the filing of its articles of incorporation therein and the appointment of an agent?

Yes.

J. L. L.

3.

Did the plaintiff, on the 23rd day of December, 1886, file with the Secretary of the Interior, at Washington, in the District of Columbia, a copy of its articles of incorporation and due proof of its organization under the same, together with a duly certified copy of the law of Washington Territory under which said corporation was organized?

Yes.

J. L. L.

4.

Did the plaintiff comply with the requirements of the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States" and the rules and regulations of the Secretary of the
36 Interior made thereunder; and, if so, when?

Yes; for the purposes of this case, February 7th, 1887.

J. L. L.

5.

Did the plaintiff, prior to February 7th, 1887, file with the Secretary of the Interior aforesaid a map or profile of its line of road over and through the land of the said S. V. William Osborne, and was the map so filed duly approved by the said Secretary of the Interior; if so, when?

Yes; February 7th, 1887.

J. L. L.

6.

Did the plaintiff, prior to the 7th day of February, 1887, duly comply with the laws of the United States and the rules and regulations of the Secretary of the Interior aforesaid with reference to railroad corporations obtaining a right of way through the public lands of the United States, as provided by the said act of Congress?

Complied; yes; grant dates Feb'y 7th, 1887.

J. L. L.

7.

Is the land claimed by the said S. V. William Osborne a part of the unsurveyed public domain of the United States?

Yes.

J. L. L.

37 8.

Has the said S. V. William Osborne ever filed or entered the said land in any United States land office under any existing law of the United States?

No.

J. L. L.

JOHN L. LOGAN, *Judge.*

Endorsed: No. 438. In district court, Shoshone Co., Idaho. The Washington and Idaho R. R. Co. *vs.* S. V. Wm. Osborne. Findings of fact submitted. Filed October 5th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods and Heyburn, att'ys for pl't'ff.

And afterwards and on October 5th, A. D. 1888, decree was filed, which is in words and figures as follows, to wit:

4.

Did the plaintiff comply with the requirements of the act of Congress approved March 3rd, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States" and the rules and regulations of the Secretary of the
36 Interior made thereunder; and, if so, when?

Yes; for the purposes of this case, February 7th, 1887.

J. L. L.

5.

Did the plaintiff, prior to February 7th, 1887, file with the Secretary of the Interior aforesaid a map or profile of its line of road over and through the land of the said S. V. William Osborne, and was the map so filed duly approved by the said Secretary of the Interior; if so, when?

Yes; February 7th, 1887.

J. L. L.

6.

Did the plaintiff, prior to the 7th day of February, 1887, duly comply with the laws of the United States and the rules and regulations of the Secretary of the Interior aforesaid with reference to railroad corporations obtaining a right of way through the public lands of the United States, as provided by the said act of Congress?

Complied; yes; grant dates Feb'y 7th, 1887.

J. L. L.

7.

Is the land claimed by the said S. V. William Osborne a part of the unsurveyed public domain of the United States?

Yes.

J. L. L.

37 8.

Has the said S. V. William Osborne ever filed or entered the said land in any United States land office under any existing law of the United States?

No.

J. L. L.

JOHN L. LOGAN, *Judge.*

Endorsed: No. 438. In district court, Shoshone Co., Idaho. The Washington and Idaho R. R. Co. *vs.* S. V. Wm. Osborne. Findings of fact submitted. Filed October 5th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods and Heyburn, att'ys for pl't'ff.

And afterwards and on October 5th, A. D. 1888, decree was filed, which is in words and figures as follows, to wit:

38 *Decree.*

In District Court, 1st Judicial District, in and for Shoshone Co., Idaho.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.
} Decree.

Now, on this day, the above-entitled action coming on for trial before the court, above-named pl't'ff appearing by Woods and Heyburn, its attorneys, and above-named def't appearing by his att'ys, Wm. H. Clagett and Albert Allen, and the court having heard the testimony offered by the parties respectively, and having examined the pleadings and exhibits in the case, and having heard the arguments of counsel upon all questions involved herein, and having duly found the facts in the case and conclusions of law arising therefrom on file herein, and being fully advised in the premises, it is ordered, adjudged, and decreed by the court—

1st. That pl't'ff has no right, title, interest, or estate in any portion of the Buckhorn ranch for a right of way or otherwise, and that it take nothing by this action.

2nd. That def't is the owner of and entitled to the possession *of*, as against pl't'ff, of the whole of the said Buckhorn ranch mentioned in his answer herein and described by metes and bounds in the fourth finding of fact found by the court and on file
39 herein; and—

3rd. That def't have and recover of pl't'ff his costs of suit herein, taxed at $——.

By the court:

JOHN L. LOGAN, *Judge.*

Oct. 4th, 1888.

A true copy.

Attest my hand and the seal of said district court this 5th day of October, A. D. 1888.

[SEAL.]

F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD, *Dep.*

Endorsed: No. 438. W. & I. R. R. Co. *vs.* S. V. Wm. Osborne. Decree. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

40 *Certificate to Judgment-roll.*

In the District Court of the First Judicial District of the County of Shoshone, Territory of Idaho.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.

I, the undersigned, clerk of the district court of the first judicial district of said Territory in and for said county of Shoshone, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book "B" of said court, on page 49; and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of the district court this 5th day of October, 1888.

[SEAL.] F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD, *Deputy*.

Endorsed: No. 438. District court of the first judicial district, county of Shoshone. The Washington and Idaho Railroad Company, plaintiff, *vs.* S. V. William Osborne, defendant. Judgment-roll. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

41 And afterwards and on January 3rd, A. D. 1889, notice of appeal was filed, which is in words and figures as follows, to wit:

Notice of Appeal.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the Territory of Idaho from the judgment and decree therein entered in the said district court on the 4th day of October, 1888, in favor of the defendant in this action and against said plaintiff and from the whole thereof.

WOODS AND HEYBURN,
Attorneys for Plaintiff.

Dated this 3rd day of January, 1889.

To William H. Clagett and Albert Allen, attorneys for defendant.

Endorsed: No. 438. In the district court, Shoshone county, Idaho Ter. The Washington and Idaho R. R. Co. *vs.* S. V. Wm. Osborne. Notice of appeal. Service accepted by copy re-
42 ceived this 3rd day of January, 1889. Wm. H. Clagett & Albert Allen, att'ys for def't. Filed January 3rd, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods and Heyburn, att'ys for pl't'ff.

And afterwards and on January 5th, A. D. 1889, undertaking on appeal was filed, which is in words and figures as follows, to wit:

Undertaking on Appeal.

In the District Court, 1st Judicial District of the Territory of Idaho, in and for the County of Shoshone.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff, *vs.* S. V. WILLIAM OSBORNE, Defendant.	Undertaking on Appeal Concerning Real Property and Money Damages.

Whereas The Washington and Idaho Railroad Company, the plaintiff in the above-entitled action, has appealed to the supreme court of the Territory of Idaho from a decree made and entered against defendant in the said action in the said district court in favor of S. V. William Osborne on the 4th day of October, 1888, for the recovery of the possession of certain lands and premises therein described and — dollars damages for the detention thereof and — dollars cost of suit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the county of Shoshone
43 and Territory of Idaho, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 5th day of January, 1889.

CHARLES HUSSEY. [SEAL.]
ADAM AULBACH. [SEAL.]

TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

Charles Hussey and Adam Aulbach, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and householder in the said county of Shoshone, Territory of Idaho, and is worth the sum in said undertaking specified as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

CHARLES HUSSEY.
ADAM AULBACH.

Subscribed and sworn to before me this 5th day of January, 1889.

BARRY N. HILLARD,
[SEAL.] *Notary Public.*

Endorsed: No. 438. District court, county of Shoshone.
44 The Washington and Idaho R. R. Co., plaintiff, *vs.* S. V. William Osborne, defendant. Undertaking on appeal concerning real property. Dated January 5th, 1889. Filed January 5th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods and Heyburn, attorneys for appellant.

And afterwards and on Janunry 5th, A. D. 1889, præcipe for transcript on appeal was filed, which is in words and figures as follows, to wit:

Præcipe.

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Plaintiff,
vs.
S. V. WILLIAM OSBORNE, Defendant.

To F. H. Grierson, clerk:

You are hereby requested to make transcript for supreme court of judgment-roll, order overruling demurrer, notice of appeal, and undertaking on appeal on file in said action.

WOODS AND HEYBURN,
Attorneys for Plaintiff.

45 Endorsed: No. 438. In district court, Shoshone county, Idaho Territory. The Washington and Idaho R. R. Co. *vs.* S. V. William Osborne. Præcipe for transcript. Filed January 5th, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

TERRITORY OF IDAHO,
County of Shoshone, } *ss:*

I, F. H. Grierson, clerk of the district court of the first judicial district of the Territory of Idaho in and for the county of Shoshone, do hereby certify that the foregoing transcript of papers from one to ten (inclusive) contain full, true, and correct copies of the complaint, answer, demurrer, finding- of fact and conclusions of law, findings of fact submitted, decree, certificate to judgment-roll, order overruling demurrer, undertaking on appeal, notice of appeal, and præcipe for transcript in the case of The Washington and Idaho Railroad Company, a corporation, *vs.* S. V. William Osborne, now remaining in my office in said county, and that an undertaking on appeal in due form has been properly filed by the appellants.

46 Witness my hand and the seal of said district court this 5th day of January, A. D. 1889.

F. H. GRIERSON, *Clerk*,
[SEAL.] By BARRY N. HILLARD, *Deputy Clerk*.

47 The following are the minutes of the supreme court of the January term, 1889:

In the Supreme Court, Idaho Territory.

JANUARY 30TH, 1889.

THE WASHINGTON AND IDAHO RAILWAY COMPANY, Pl'ff & App., *vs.* S. V. WILLIAM OSBORNE, Def't & Resp. } No. 19. Appeal, 1st Dist., Shoshone Co.

This day comes the respondent herein and moves the court to strike out certain parts of the record herein; which motion was taken under advisement by the court.

In the Supreme Court, Idaho Territory.

FEBRUARY 1ST, 1889.

THE WASHINGTON AND IDAHO RAILWAY COMPANY, Pl'ff & App., *vs.* S. V. WILLIAM OSBORNE, Def't & Resp. } No. 19. Appeal, 1st Dist., Shoshone Co.

The respondent's motion to strike out certain portions of the transcript herein, to wit, all that portion on page 31, begin-ing with the words "In the district court of," and pages 32, 33, and
48 down to the words "and afterwards," on page 34, and said motion having been heard and considered, it is now ordered that said motion be, and the same is hereby, granted, the court reserving the right to modify this order if any of the portions stricken out are found material to a decision herein.

In the Supreme Court, Idaho Territory.

FEBRUARY 6TH, 1889.

THE WASHINGTON AND IDAHO RAILWAY CO., Pl'ff & App., *v.* S. V. WILLIAM OSBORNE, Def't & Resp. } No. 19. Appeal, 1st District, Shoshone Co.

This day this cause came on for hearing and having been heard was submitted and taken under advisement by the court.

In the Supreme Court, Idaho Territory.

TUESDAY, *March 19th*, 1889.

THE WASHINGTON AND IDAHO RAILWAY COMPANY, Pl'ff, *vs.* S. V. WILLIAM OSBORNE, Def't. } Appeal from 1st District.

49 And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Chief Justice Weir, to the effect that the judgment of the court below be affirmed.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the first judicial district in and for the county of Shoshone in the above-entitled cause be, and the same is hereby, affirmed.

50 In the Supreme Court of Idaho Territory, January Term, A. D. 1889.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, Appellant, *vs.* S. V. WILLIAM OSBORNE, Respondent. } Opinion.

WEIR, *C. J.:*

This is an action brought by the plaintiff, in which it appears that the plaintiff, as a duly organized corporation, has duly filed its certificate of incorporation and due proofs of its organization under the act of March 3rd, 1875, and is entitled to a right of way for the purpose of constructing its railroad over the public lands of the United States; that the defendant claims that he is the owner of a part of said public land, and that he is entitled to the possession of the same as against the plaintiff; that thereupon, on the 28th day of July, 1888, plaintiff commenced proceedings in condemnation against said defendant to condemn the right of way for its road over and through the land so claimed by the defendant; that

51 upon such proceedings the district court, on the 13th day of August, 1888, appointed commissioners to appraise and assess the damages which the said Osborne would suffer by reason of the said condemnation for plaintiff's right of way; that the commissioners took testimony and reported, after viewing the premises and hearing the testimony, that the total damage sustained by the defendant by reason of the taking of the premises by the plaintiff were $6,670. The plaintiff declines to make tender of that sum or any sum to the defendant upon the ground that the defendant is not entitled to the possession of the premises as against the plaintiff. Plaintiff offers to pay the money into court and abide the determination of the question, and thereupon proceeds to ask judg-

ment that it may be decreed to be the owner and entitled to the possession of the land and also be entitled to enter upon the same for the purpose of constructing its railroad without the payment or tender of the damages so found by the commission, and asks for an injunction restraining and enjoining the defendant from interfering with it in the construction and operation of its road.

52 The defendant, answering, alleged that he was in all respects qualified in law to initiate proceedings to obtain title to 160 acres of agricultural land belonging to the United States; that the land upon which defendant was in possession was located and settled upon in the year 1885 by one Seth McFarren and Samuel Norman, who in that year built a house and other buildings thereon, marked off the corners of the same, and partly fenced the same on its exterior boundary, as defined by their corner stakes; that said McFarren and Norman resided constantly upon the said property, living in the dwelling-house aforesaid, and constantly engaged in enclosing and improving the same during the year 1885 and down to March, 1886, at which date the defendant duly purchased the same from them, paying therefor the sum of $2,000; whereupon the defendant went into possession of the entire tract of land, comprising 160 acres, with the intent, in good faith, to initiate and perfect the title thereto under the homestead or pre-emption laws of the United States, and that since that time the defendant has

53 resided upon the ranch continuously, constantly improving the same, and completed the enclosure thereof, and that altogether he has expended the sum of $8,000, exclusive of the sum of $2,000 heretofore paid therefore as aforesaid. The defendant further alleged that the proposed right of way of plaintiff goes through the center of defendant's garden, which defendant has thoroughly reduced to cultivation and set out in orchard, and conceded that the land is unsurveyed public land of the United States.

The appeal in this action is from the judgment and decree only. It does not appear that any motion for a new trial has been made or any statement been filed in pursuance of sec. 4443 of the Revised Statutes of Idaho. We can therefore, in disposing of this case, consider only the judgment-roll. If that appear to be correct the judgment must be affirmed.

Gamble *v.* Dunwell, 1 Idaho, 268.
The People *v.* O'Connor, 1 Idaho, 759.
Purdy *v.* Steel, 1 Idaho, 216.
Caney *v.* Silverthorne, 9 Cal., 67.

The findings of the court in this case are conclusive of the facts, and the only question that remains is whether the conclu-

54 sions of law are supported by the findings of fact.

The court found, as a matter of fact, that on the 5th day of July, 1886, the plaintiff became a duly organized corporation under the laws of Washington Territory for the purpose of constructing and operating a railroad through a certain part of Shoshone county, and on the 8th day of November, 1886, filed amended articles of incorporation extending the line which the plaintiff pro-

posed to construct. The property in question is covered by the extension.

The court further finds that the defendant is a native-born citizen of the United States, has never had the benefit of the pre-emption or homestead laws, and is in all respects qualified in law to initiate proceedings to obtain title to 160 acres of the agricultural land belonging to the United States; that the lands in question are part of the unsurveyed public land of the United States and agricultural in character; that the premises in question were settled upon in the year 1885 by Seth McFarren and Samuel Norman, who proceeded to erect buildings thereon and located the same as required by law; that on the 18th day of March, 1886, in considera-
55 tion of $2,000, these parties sold and conveyed to the defendant all the improvements upon the said premises and the right of possession which the said parties then had; whereupon said Osborne entered into possession and continued in possession up to the time of the commencement of this action and has duly located the said section as required by law and filed in the office of the county recorder of Shoshone county, Idaho, his declaration to hold said premises under the pre-emption law, under the possessory land act of the Territory; that during all the time since the 18th day of March, 1886, defendant has resided upon the premises, making the same his home, and has made large and valuable improvements thereon, and that he intends to obtain title to said premises under the pre-emption laws of the United States as soon as the same shall be surveyed by the Government.

As conclusion of law from these facts the court found that the defendant is now and at all times since the 18th day of March, 1886, has been the owner of as against all persons except the United States and in possession of the land and premises described in the answer; that the title and right of possession of defendant in and to
56 said premises is prior to and paramount to the right of way of the plaintiff over the said premises, and that the plaintiff has no estate or interest in or to the right of way over and across said premises or any part thereof as against the defendant; that defendant is entitled to a judgment and decree of this court, and that he have judgment for the costs.

The only question presented in this case is whether the defendant's possessory claim can be taken by the plaintiff without compensation.

It appears that the defendant's right was acquired before the organization of the plaintiff, and that the plaintiff had no right whatever. The act of March 3rd, 1875, provides that the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned. Sec. 3 of said act. It is under this act that the plaintiff claims its right. The legislature of Idaho has provided a law for the condemnation by railroad companies of the right of way over possessory claims. Title 7 of the Revised Statutes. Congress itself by the act seemed to provide for condemnation of
57 possessory claims, and undoubtedly the defendant's claim

was a possessory one, and this plaintiff could not enter upon it and take it from the possession of the defendant, unless it had a prior right, without due compensation.

The question of a rule of damages in a case of this kind, where the property itself is property of the United States, is another question, but is not presented for our consideration in this case.

It appears from an examination of the judgment-roll that it is in all respects regular, and that the conclusions of law are sustained by the findings of fact. The judgment is therefore affirmed with costs.

WEIR, *C. J.*

Endorsed: Washington and Idaho Railway Co. *vs.* S. V. William Osborne. Filed March 19th, 1889. J. H. Hays, clerk, by H. W. Weir, Jr., deputy clerk.

58 Supreme Court of the United States.

THE WASHINGTON AND IDAHO RAILROAD COMPANY, a Corporation, Appellant,
vs.
S. V. WILLIAM OSBORNE, Respondent.

Know all men by these presents that we, The Washington and Idaho Railroad Company, as principal, and Charles Hussey and Adam Aubach, as sureties, are held firmly bound unto S. V. William Osborne in the sum of five hundred dollars, to be paid to the said S. V. William Osborne; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 17th day of April, 1889.

Whereas the above-named Washington and Idaho Railroad Company has p-osecuted an appeal to the Supreme Court of the United States to reverse the judgment in the above-entitled suit by the supreme court of the Territory of Idaho:

Now, therefore, the condition of this obligation is such that if the above-named Washington & Idaho Railroad Company shall prosecute its said appeal to effect and insure all damages and
59 costs if it shall fail to make good its said appeal, then this obligation shall be void; otherwise shall be and remain in full force and virtue.

CHARLES HUSSEY.
ADAM AULBACH.

Sealed and delivered in presence of—
BARRY N. HILLARD.

TERRITORY OF IDAHO, *County of Shoshone,* } *ss:*

Charles Hussey and Adam Aulbach, being severally duly sworn, each for himself says that he is a resident and freeholder in the

county of Shoshone, Idaho Territory, and worth the sum specified in the foregoing bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

CHARLES HUSSEY.
ADAM AULBACH.

Subscribed and sworn to before me this 17th day of April, 1889.
BARRY N. HILLARD, [SEAL.]
Notary Public.

Aug. 24th, 1889.—This bond is approved.
H. W. WEIR,
C. J. of S. Court, Idaho.

60 IDAHO TERRITORY, *ss:*

Supreme Court.

I, S. H. Hays, clerk of the supreme court of Idaho Territory, do hereby certify that the foregoing — pages are true and correct copies of the original transcript on appeal to the supreme court of Idaho Territory, minutes of proceedings had in said court, opinion of the court, dissenting opinion of Justice Berry, and bond on appeal to the Supreme Court of the United States, and of the whole thereof.

Attest my hand and the seal of the supreme court of the Territory of Idaho this 28th day of September, 1889.

[Seal Supreme Court Idaho Territory.]

S. H. HAYS,
Clerk Supreme Court Idaho Territory.

Endorsed on cover: Case No. 14,031. Idaho Territory supreme court. No. 102. The Washington & Idaho Railroad Company, appellant, *vs.* S. V. William Osborn. Filed May 9, 1890.

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IN THE

Supreme Court of the United States.

October Term, 1893.

No. 102.

THE WASHINGTON and IDAHO RAILROAD COMPANY,
Appellant,

vs.

S. V. WILLIAM OSBORNE, Appellee.

BRIEF FOR APPELLANT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

WASHINGTON AND IDAHO RAILROAD COMPANY, Appellant,

vs.

S. V. WILLIAM OSBORNE, Appellee.

No. 102.

Statement of the Case.

This is a suit in equity brought in the district court of the Territory of Idaho by the appellant against the appellee to determine the right of possession of the certain right of way for a railroad claimed by the appellant, by virtue of the grant made by the general right-of-way act of March 3, 1875, and to restrain the appellee from interfering with the building of appellant's railroad upon such right of way.

The appellee claims to be the owner of a certain ranch claim situated on the unsurveyed public lands of the United States in Shoshone County, Idaho, and to be entitled to the possession of the ranch by virtue of being a qualified pre-emptor (Record, pp. 10, 11).

The appellant claims a right of way over said land by virtue of a compliance with the act of Congress approved March 3, 1875, and prays that its title to said right of way be declared paramount and superior to the claim of the appellee, and asks a decree accordingly (Record, pp. 2–7).

The complaint alleges that on the 28th day of July, 1888, the appellant commenced proceedings in condemnation to acquire a right of way over said ranch, and that thereafter the commissioners were appointed to appraise the damages that the appellee would suffer, and testimony was heard concerning the title of the appellee, and by said testimony it appeared that the appellee had only what is known as a "squatter's right," and had never made any entry or filing in any United States land office upon the land, and had taken no steps to acquire any title thereto from the Government of the United States (Record, p. 6).

It is further alleged in the complaint (Record, p. 6) that prior to the commencement of the proceedings for condemnation the appellant had not, and could not, acquire sufficient information to advise it of the nature and character of the appellee's claim to said land; and that from the testimony given by the appellee the appellant is advised, and believes, that the appellee has no title or right to the possession of the said premises and right of way as against the appellant; and that in equity and good conscience the appellant should not be compelled to pay appellee any damages or compensation for the right of way over said land (Record, pp. 6, 7).

The appellant then offered to pay into court the sum of money assessed by the commissioners as damages to the appellee, there to abide the result as to the right of occupancy of the right of way in controversy (Record, p. 7).

The appellee by his answer denies specifically the allegations of appellant's complaint, and denies that the appellant is incorporated or has any title or right of way over the said land (Record, pp. 9 and 10).

The answer alleges that the appellee is a citizen of the United States, over 21 years of age, and is a qualified pre-emptor under the land laws of the United States;

that he has been occupying the lands in controversy since March 16, 1886; that he has filed his homestead declaration under the laws of Idaho Territory with the recorder of the county in which the land is situated; that he intends to initiate and perfect a title under the homestead or pre-emption laws of the United States; that he has partially enclosed the same, and has expended a large sum of money in erecting buildings thereon; that he has cultivated a portion of the land over which the appellant's right of way is claimed; that the land was unsurveyed public domain of the United States; and that he has settled upon the same in good faith and for his own exclusive use.

The trial court having heard and considered all of the evidence adduced by the respective parties, made certain findings of fact, which are set forth in the Record, pages 12 to 16. The evidence is not set forth in the Record, and the only question in the case is whether the conclusions of law and decree made by the trial court are supported by the findings of fact. Such findings of fact are as follows:

"First. That on the 5th day of July, 1886, the plaintiff became a duly-organized corporation under the laws of Washington Territory for the purpose of constructing, equipping, operating and maintaining a railroad from the town of Farmington, in Washington Territory, by the most practical route in a generally northern direction to a point at or near Spokane Falls, in said Territory; and by a junction with said line near the forks of Hangman Creek, in said Territory, in a general northeasterly direction, across the Cœur d'Alene Indian Reservation, to a point near the mouth of the St. Joseph River, on Cœur d'Alene Lake, to Cœur d'Alene River. Thence in a generally easterly direction to the Cœur d'Alene Mission; thence in a southeasterly direction to the valley of the South Fork of the Cœur d'Alene River, via the town of Milo, to Wardner, Idaho Territory; and that afterwards, to wit, on the 8th day of November,

1886, by amended articles of incorporation, the plaintiff became a corporation organized to construct a like railroad from said town of Milo, following said South Fork of the Cœur d'Alene River to the town of Mullan, and that the premises in controversy herein are situated in the valley of the said South Fork and between said towns of Milo and Mullan.

"Second. That each and all the allegations contained in the 2d, 3d, 4th, 5th and 6th sub-divisions of plaintiff's complaint are true.

"Third. That the defendant is a native-born citizen of the United States, over the age of twenty-one years, and has never had the benefit of the pre-emption or homestead laws of the United States, and is in all respects qualified in law to initiate proceedings to obtain title to one hundred and sixty acres of agricultural lands belonging to the United States, and that the lands and premises hereinafter described, and every part thereof, are a part of the unsurveyed public lands of the United States, and agricultural in character, not reserved from sale under the laws of the United States.

"Fourth. That in the year 1885 one Seth McFarren and one Samuel Norman settled upon the premises hereinafter described, who in that year erected a house and other buildings thereon, marked off the corners of the same on its exterior boundaries as defined by their corner stakes, and that said McFarren and Norman resided constantly upon the said premises, living in the dwelling house aforesaid, and constantly engaged in improving the said premises until the 18th day of March, 1886, at which date, by deed of conveyance, in consideration of the sum of two thousand dollars, they conveyed the said premises and all the improvements thereon to the defendant, and that the defendant at the time of the said purchase caused the said premises to be surveyed by a surveyor and erected new corner posts at each corner thereof, and caused such posts to be plainly marked, so as to indicate the corners of said premises, and with the name of said Osborne as the claimant, and that after the said purchase the defendant filed in the office of the county recorder of Shoshone County, Idaho, his declaration to hold said premises under the pre-emption law under the possessory land act of said Territory, and that

said premises contain less than one hundred and sixty acres, and are described as follows, to wit:

"Fifth. That during all the time since the 18th day of March, 1886, the defendant has resided upon the said premises, and still resides thereon, making the same his home, and has made improvements thereon to the value of eight thousand dollars, consisting of a hotel, barn, stables, ice house, cellar, fences, clearing and cultivating sixty acres of land, etc.; and that prior to the making of any survey for a railroad by plaintiff over the same in the year 1886 the defendant enclosed all of said premises by a substantial fence, excepting a portion of the line on the south side thereof, where the base of the mountain and the fallen timber made a natural barrier sufficient to turn stock, and with the exception of a few places on the north line of said premises, where the steep bank of the river formed a natural barrier sufficient to turn stock; and that at the time said defendant settled thereon he intended, and ever since has intended, and now intends, to obtain title to said premises under the pre-emption laws of the United States as soon as the same shall be surveyed by the Government, and that the defendant is not the proprietor of 320 acres of land in any State or Territory, and did not quit or abandon a residence on his own land to reside on the public lands in this Territory, and that the defendant has not settled upon or improved the said premises to sell the same on speculation, but in good faith to appropriate the same to his own exclusive use, and that he has not, directly or indirectly, made any agreement or contract in any way or manner with any person whatsoever by which the title which he may receive from the Government shall inure, in whole or in part, to the benefit of any person except himself."

At the instance of the appellant, the court found upon the following facts, and answered the questions asked as below indicated (Record, pp. 15, 16):

"1. Was the plaintiff at the time alleged in the complaint, to wit, since the 5th day of July, 1886, a corporation duly organized and existing under the laws of Washington Territory, for the purpose, among others, of

constructing, equipping, operating and maintaining a railroad and telegraph line, as in said complaint alleged?

"Yes.—J. L. L.

"2. Had the plaintiff complied with the laws of Idaho Territory with reference to the filing of its articles of incorporation therein and the appointment of an agent?

"Yes.—J. L. L.

"3. Did the plaintiff on the 23d day of December, 1886, file with the Secretary of the Interior at Washington, in the District of Columbia, a copy of its articles of incorporation and due proof of its organization under the same, together with a duly-certified copy of the law of Washington Territory under which said corporation was organized?

"Yes.—J. L. L.

"4. Did the plaintiff comply with the requirements of the act of Congress approved March 3, 1875, entitled 'An act granting to railroads the right of way through the public lands of the United States,' and the rules and regulations of the Secretary of the Interior made thereunder, and, if so, when?

"Yes, for the purpose of this case, February 7, 1887.—J. L. L.

"5. Did the plaintiff, prior to February, 1887, file with the Secretary of the Interior aforesaid a map or profile of its line of road over and through the land of the said S. V. William Osborne, and was the map so filed duly approved by the said Secretary of the Interior; if so, when?

"Yes; February 7, 1887.—J. L. L.

"6. Did the plaintiff, prior to the 7th day of February, duly comply with the laws of the United States, and the rules and regulations of the Secretary of the Interior aforesaid, with reference to railroad corporations obtaining a right of way through the public lands of the United States as provided by the said act of Congress?

"Complied; yes; grant dates from February 7, 1887.—J. L. L.

"7. Is the land claimed by the said S. V. William Osborne a part of the unsurveyed public domain of the United States?

"Yes.—J. L. L.

"8. Has the said S. V. William Osborne ever filed or entered the said land in any United States land office under any existing law of the United States?

"No.—J. L. L."

Upon such findings of fact, the trial court made the following conclusions of law, which are set forth in the Record, page 14:

"First. The defendant is now, and at all times since the 18th day of March, 1886, has been the owner of, as against all persons except the United States, and in possession of the land and premises described in the answer as the Buckhorn Ranch, and in all respects qualified and entitled to enter the same under pre-emption laws of the United States.

"Second. That the title and right of possession of defendant in and to said premises is prior to and paramount to the right of way of the plaintiff over said premises, and that plaintiff has no estate, or interest in, or right of way over or across said premises, or any part thereof, as against the defendant.

"Third. That defendant is entitled to a judgment and decree of this court; that this action be dismissed, and that defendant have judgment for his costs herein, and it is so ordered."

Upon such conclusions of law the trial court entered a decree (Record, p. 17), in which it was adjudged and decreed:

"1st. That plaintiff have no right, title, interest, or estate in any portion of the Buckhorn ranch for a right of way or otherwise, and that it take nothing by this action.

"2d. That defendant is the owner of and entitled to the possession of as against plaintiff of the whole of the said Buckhorn ranch mentioned in his answer herein, and described by metes and bounds in the fourth finding of fact by the court, and on file herein."

From this decree the appellant appealed to the Supreme Court of Idaho Territory, and that court affirmed the judgment of the district court. The opinion of the Supreme Court is found at pages 22 to 25 of the Record. To reverse this judgment of the Supreme Court of Idaho Territory the appellant appeals to this court.

ASSIGNMENT OF ERRORS.

The appellant makes the following assignment of errors:

1st. That the conclusions of law are not supported by the findings of fact made by the trial court.

2d. The court erred in finding as a conclusion of law that the appellee is now and at all times since the first day of March, 1886, has been the owner of, as against all persons except the United States, of the premises described in the answer as the "Buckhorn ranch."

3d. That the court erred in finding as a conclusion of law that the appellee was in all respects qualified and entitled to enter the said Buckhorn ranch under the pre-emption laws of the United States.

4th. That the court erred in finding as a conclusion of law that the title and right of possession of the appellee in and to the said Buckhorn ranch is prior to and paramount to the right of way of the appellant over said premises, and that appellant has no estate or interest or right of way over or across said premises, or any part thereof.

5th. That the trial court erred in entering judgment, and decreeing that the appellant has no right, title, interest, or estate in any portion of the Buckhorn ranch for right of way, or otherwise, and that it take nothing by this action.

6th. The trial court erred in decreeing that the appellee is the owner of and entitled to the possession, as against the appellant, of the whole of the said Buckhorn ranch mentioned in the appellee's answer, and described by metes and bounds in the fourth finding of fact made by the trial court.

7th. That the court erred in decreeing that the appellee have and recover of the appellant the costs of this suit.

8th. That the court erred in entering up judgment in favor of the appellee and against the appellant.

ARGUMENT.

By the first section of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States" (18 Stats., 482), a right of way through the public lands of the United States is granted by words of present grant to any railroad company organized under the laws of any State or Territory which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road. The only exception to the grant is that contained in the fifth section, wherein it is enacted that the act shall not apply "to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale." Section 4 provides that any railroad company desiring to secure the benefits of the act shall, within certain periods therein prescribed, file with the register of the land office for the proper district a profile of its road; and that when such map is approved by the Secretary of the Interior, all lands over which such right of way shall pass shall be disposed of subject to such right of way. For convenience, this act is set forth in the appendix to this brief.

The district court of Idaho found that the appellant was duly incorporated for the purpose of constructing a railroad across the premises occupied by Osborne, the appellee; that appellant, on or prior to February 7, 1887, had fully complied with all the requirements of the act of March 3, 1875, and with all the rules and regulations of the Secretary of the Interior relative to corporations claiming the benefits of the act; and that a profile of appellant's road over the premises in question was ap-

proved by the Secretary of the Interior on February 7, 1887. (Second finding of fact, Record, 13; additional finding of fact, Record, p. 15.)

The appellant therefore, by virtue of the grant made by the first section of the general right-of-way act, acquired a right of way two hundred feet in width (200) over the premises in controversy, provided such lands were public lands of the United States not "within the limit of any military, park, or Indian reservation" or were public lands not "specially reserved from sale."

It is alleged in the bill (paragraph 10, Record, p. 6; paragraph 14, Record, p. 7) that at the time of the approval of appellant's map showing the location of its road across the lands occupied by Osborne, that such lands were part of the unsurveyed public domain of the United States. These allegations are not denied by the answer; and the trial court by its third finding of fact (Record, p. 13) found that the premises occupied by Osborne "are part of the unsurveyed public lands of the United States and agricultural in character, not reserved from sale, and subject to settlement under the laws of the United States."

The court having found these facts, it was not competent for any person to defeat the right of possession of the appellant by any claim other than a grant from the Government prior in point of time to the 7th day of February, 1887.

The extent of the appellee's claim, as found by the court, is that he is a qualified pre-emptor residing on unsurveyed public lands of the United States, and in possession of the same at the time appellant's grant took effect. (Third finding of fact, Record, p. 13.)

The appellee never filed upon, or entered on said land under any law of the United States. (Eighth additional finding of fact, Record, p. 16.)

The occupation of such unsurveyed lands by the appellee was held sufficient by the trial court and by the

Supreme Court of Idaho to except such unsurveyed lands from the operation of the grant made to the appellant as a result of its compliance with the provisions of the general right-of-way act. The only question involved on this appeal is the correctness of such ruling. The decision of the Supreme Court of Idaho can be sustained on but one of two grounds, viz.:

First. That Osborne's occupation of the lands in controversy gave him such a right in the premises as to prevent a grant of them being made by the United States to any other person whatsoever; or,

Second. That Osborne's occupancy of the lands gave him such rights in the premises as to bring them within the exception contained in the fifth section of the general right-of-way act of March 3, 1875.

There is nothing in the nature of Osborne's possession of such unsurveyed lands that would prevent the United States from granting the same to any person it saw fit.

Frisbie *v.* Whitney, 9 Wallace, 187;
Yosemite Valley cases, 15 Wallace, 77;
Buxton *v.* Traver, 130 U. S., 232.

The lands were therefore public lands capable of being granted by the United States to any person whom it saw fit; and a right of way over the premises was actually granted to the appellant by the act of March 3, 1875, unless Osborne's occupation and possession of the premises was sufficient to specially reserve them from sale.

Osborne's settlement upon the unsurveyed lands in controversy did not except them from the operation of the grant made to the appellant by the general right-of-way act. The only public lands excepted from the operation of the act are those described in the fifth section, namely, lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale. On familiar principles of statutory construc-

tion, the general word "other" used in this section is to be construed as applicable to reserved lands similar to military, park, or Indian reservations. (Southerland on Statutory Construction, sections 268–273.) Such construction also finds support in the use of the word "specially" in connection with the word "reserved."

Osborne's settlement upon the lands in controversy did not reserve them from sale. Indeed, he settled upon them for the very purpose of acquiring a right to buy in case the United States should ever choose to sell; and the fact was, as truly stated by the trial court in its third finding (Record, p. 13), that the lands in controversy are part of the unsurveyed public lands of the United States, and not reserved from sale. By section 4 of the general right-of-way act, the fact of the approval of the maps of the appellant was required to be noted upon the plats in the office of the register of the land office for the district wherein the lands were situated, and thereafter the lands over which such right of way should pass could only be disposed of subject to such right of way. The result is that long prior to the time when the lands were surveyed (the first time when Osborne could even acquire a right to buy), the United States, by the general right-of-way act, would have caused to have been noted upon the plats the fact that the premises in controversy should only be disposed of and sold subject to the right of way of the appellant. The offered gift of a pre-emption to Osborne from the United States was necessarily subject to the provisions of the right-of-way act of March 3, 1875, in force at the time such offer was made.

The nature of Osborne's rights in the premises in controversy is thus stated by Mr. Justice Field in Buxton *v.* Traver, 130 U. S., 232, 235:

"No portion of the public domain, unless it be in special cases not affecting the general rule, is open to sale until it has been surveyed and an approved plat of the

township embracing the land has been returned to the local land office. A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified time after the surveys and the return of the township plat, the settler takes certain steps, that is, files a declaratory statement, such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires for the first time a right of pre-emption to the land; that is, a right to purchase it in preference to others. Until then he has no estate in the land which he can devise by will, or which, in case of his death, will pass to his heirs at law. He has been permitted by the Government to occupy a certain portion of the public lands, and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing, that is, the right to pre-empt it. The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him—if you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them. If those steps are from any cause not taken, the proffer of the Government has not been accepted, and a title in the occupant is not even initiated. The title to the land remains unaffected, and subject to the control and disposition of the Government, as before his occupancy. This doctrine has been long established by this court."

No words can be found in the fifth section which can by any possible construction be made to apply to the highest right which can possibly be claimed by Osborne, namely, a right to acquire a right to buy in case the United States should ever choose to sell. (Buxton *v.* Traver, 130 U. S., 232.)

No hardship is worked to the appellee by such construction of the general right-of-way act. The act was in force as part of the general public land system of the United States long prior to the time when Osborne made his settlement upon the lands in question, and he made such settlement with notice of the fact that when the United States decided to sell such lands, they might possibly only be disposed of subject to rights of way acquired by the appellant or other railroad companies under the general right-of-way act.

To introduce by construction any exception in the general right-of-way act, which would render the grant there made inoperative as to unsurveyed public lands occupied by squatters, is to do violence to the intention of Congress indicated by the significant omission of any words describing or mentioning any such right as that claimed by the appellee in this case.

Prior to the enactment of the general right-of-way act numerous grants were made to railroads, giving them the right-of-way through public lands and making grants of land subsidies to aid in the construction of such roads. In all of these acts the grant of the right-of-way is an absolute grant, without exceptions or reservations. In making the grant of lands as subsidies to aid in the construction of the road, Congress by apt language excepted lands "sold, reserved, or otherwise disposed of, or to which a pre-emption or homestead claim may have attached." Compare sections 2 and 3 of the Union Pacific charter (act of July 1, 1862, 12 Stats., 489); sections 2 and 3 of the Northern Pacific charter (act of July 2, 1864, 13 Stats., 365); sections 2 and 3 of the charter of the Oregon and California Railroad Company, act of July 2, 1866, 14 Stats., 239); sections 2 and 3 of the charter of the Atlantic and Pacific (act of July 27, 1866, 14 Stats., 292); sections 8 and 9 of the charter of the Texas and Pacific (act of March 3, 1871, 16 Stats., 573); and the

first and sixth sections of the act granting lands to Kansas to aid in the construction of the Northern Kansas Railroad (act of July 23, 1866, 14 Stats., 210). The reason for the difference in the language used in making the two classes of grants is stated and explained by this court in Railroad Company *v.* Baldwin, 103 U. S., 426. In Union Pacific Railway Company *v.* Douglas County, 31 Fed. Rep., 540, Mr. Justice Brewer held that the grant of right-of-way made by the Union Pacific charter of July 2, 1862, was superior to the reservation of sections 16 and 32 for school purposes, made by the organic act of Nebraska passed in 1854. It was there held that the grant of right-of-way made by the Union Pacific charter was so absolute in its terms as to apply even to lands then expressly reserved for another purpose. To avoid the necessity of applying to Congress for special acts granting rights of way through public lands to facilitate in the construction of railroads, Congress, in 1875, adopted the general right-of-way act under consideration. No reasons existed why this general grant of right-of-way should not be as full and complete as the special grants had been. The enterprises to be promoted by such grants were to be of great value to the Government, and the public in the development of the country, and Congress has used, in the first section of the general right-of-way act, the same absolute and positive granting words found in the second section of the charter of the Union Pacific Railroad Company, and afterwards repeated in the other Congressional grants already referred to. The only exception made in the general right-of-way act is that contained in the fifth section. By this section Congress did not except lands to which a pre-emption or a homestead claim might have attached at the time of the taking effect of the grant; but pre-emption and homestead claims were left subject to the grant of the right of way in the general right-of-way act for the same reason that such

claims were left subject to the grants of right of way made by the special acts already cited. To except by judicial construction from the operation of the general right-of-way act, lands occupied by a squatter like the appellee, who has made no filing or entry, and who had not and could not even acquire a right of pre-emption as to such unsurveyed lands, is clearly to do violence to the legislative intent and purpose of Congress.

To except from the grant unsurveyed lands occupied by a qualified pre-emptor would subject railway companies undertaking to build railroads across public lands under the general right-of-way act to great hardships. Osborne, by his settlement upon such unsurveyed lands, acquired no rights which he could devise or convey (Buxton *v.* Traver, 130 U. S., 232–235). If the grant made by the general right-of-way act does not apply to the land occupied by him, and he has a right to resist the entry of the appellant and make it pay damages, what rights, if any, would the company acquire after having satisfied any claim which he might make? Osborne could take his money and move away, and would not even lose his right to pre-empt other lands, because he has not even filed his declaratory statement (eighth additional finding of fact, Record, p. 16). The appellant would take nothing from him because he had nothing which he could sell, and would take nothing by the act when he vacated the premises, because if the lands as a result of his occupancy were excepted from the operation of the grant made by the general right-of-way act at the time of the taking effect of the grant, then they were excepted forever.

Kansas Pacific Railway Company *v.* Dunmeyer, 113 U. S., 629;

Bardon *v.* Northern Pacific Railroad Company, 145 U. S., 535.

Another qualified pre-emptor could occupy such un-

surveyed lands, and the railroad company would immediately become a trespasser thereon, and would have to satisfy his claim for damages. The case supposed is exactly presented by the facts in the case of Hamilton *v.* Spokane and Palouse Railroad Company, 28 Pacific Reporter, 408, in which a person, after the grant took effect, made settlement upon lands over which the right of way passed and claimed damages from the railroad company, because at the time the grant took effect the lands were covered by a pre-emption filing afterwards cancelled, the contention of the settler being that the lands were excepted from the grant under the decision of this court in Railroad Company *v.* Dunmeyer, 113 U. S., 629. After having satisfied such second settler, he could then move away; and so the bleeding process would continue until some one acquired title to the lands from the Government; and then the railroad company, for the first time, could acquire a title to the land which would be a protection to it, and would probably have to buy back its own railroad, because such railroad was constructed without even a claim of right upon the lands of another person. Any construction of the act leading to this result was certainly not the intention of Congress.

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